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No. 80-207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

CBS INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 312(a)(7) of the Communications Act of 1934, 47 U.S.C. § 312(a)(7), authorizes the Federal Communications Commission (the "Commission") to revoke broadcast licenses for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time" by candidates for federal elective office. Before enactment of Section 312(a)(7), the Commission, while construing the Communications Act to require that broadcasters make available to candidates time for political broadcasts, had afforded broadcasters wide latitude in responding to individual candidate requests. In the present case, each of the three major commercial television networks declined to offer President Carter's campaign committee time for a thirty-minute paid political advertisement in December 1979, although CBS Inc. did offer two five-minute periods. By a four-to-three majority, the Commission held that Section 312(a)(7) creates a new, individual right of access for federal candidates and that all three networks had violated Section 312(a)(7). The court of appeals affirmed. The questions presented are:

1. Whether the court below erred in construing Section 312(a)(7) to create new and enlarged obligations for broadcasters, in light of the statutory language and legislative history and the contrary conclusion of this Court in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94, 113-14 n.12 (1973).

2. Whether Section 312(a)(7), as construed by the Commission and the court below, violates the First Amendment by foreclosing good faith broadcaster editorial policy judgments designed to serve the public interest and the needs of all candidates in an evenhanded

fashion and by engaging the Commission in an inherently subjective, case-by-case determination of whether, when and how much time should be sold to individual candidates.[1]

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[1] The following were parties to the proceeding in the court of appeals: CBS Inc., American Broadcasting Companies, Inc., and National Broadcasting Company, Inc., petitioners; Federal Communications Commission and United States of America, respondents; Carter/Mondale Presidential Committee, Inc., and National Association of Broadcasters, intervenors.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CBS Inc. ("CBS") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of March 14, 1980, in *CBS Inc.* v. *Federal Communications Commission*, Nos. 79-2403, 79-2406 and 79-2407.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and appears as Appendix A.[2] The opinions of

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[2] The appendices are contained in a separately bound volume. American Broadcasting Companies, Inc. and National Broadcasting Company, Inc., which are filing separate petitions, have joined in these appendices.

the Federal Communications Commission are reported at 74 F.C.C.2d 631 (1979) and 74 F.C.C.2d 657 (1979), and appear as Appendices B and C.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1980. App. A at 2a. On May 15, 1980, the court of appeals denied petitions for rehearing filed by American Broadcasting Companies, Inc., National Broadcasting Company, Inc., and the National Association of Broadcasters. Appendix D.[3] On June 4, 1980, the time for filing this petition was extended to August 11, 1980, in an order signed by Mr. Chief Justice Burger. Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 312(a)(7) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(a)(7), 315. These constitutional and statutory provisions are set forth in Appendix G.

STATEMENT OF THE CASE

Regulatory Background

Section 312(a)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(a)(7), provides that the Commission may revoke a broadcast station license for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time"

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[3] CBS also submitted a petition for rehearing, but an accompanying motion for leave to exceed the applicable page limitation was denied.

by a candidate for federal elective office. Before the enactment of Section 312(a)(7), it had been held that a broadcast licensee's obligation to act in the public interest included the obligation to sell or make available free time to political candidates.[4] In applying this policy, the Commission made clear that "the licensee's role in the area of political broadcasts is essentially the same as in other programming areas—to make good faith judgments as to how to meet his community's needs and interests."[5]

Against this background, Section 312(a)(7) was enacted as part of the Federal Election Campaign Act of 1971.[6] Early interpretations of the statute reflected the view that Section 312(a)(7) did not represent a significant departure from prior Commission practice. In a policy statement issued shortly after the enactment of Section 312(a)(7), the Commission stated that it would judge political access claims under that section by "the same test of reasonableness" it had developed in applying the fairness doctrine.[7] In 1973, this Court concluded that Section 312(a)(7) "essentially codified" the Commission's practice prior to enactment of that section.

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[4] *See Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 534 (1959); *see also Hon. Dan Walker*, 57 F.C.C.2d 799 (1975).

[5] FCC Memorandum on Second Sentence of Section 315(a), in *Political Broadcasts—Equal Time: Hearings before a Subcomm. of the House Comm. on Interstate and Foreign Commerce on H. J. Res. 247*, 88th Cong., 1st Sess. 90 (1963). The Commission has continued to apply this public interest standard to requests for access by state and local candidates, who are not mentioned in Section 312(a)(7). *E.g., Hon. Dan Walker*, 57 F.C.C.2d 799 (1975).

[6] Pub. L. No. 92-225, 86 Stat. 3 (1972).

[7] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 538 (1972).

Columbia Broadcasting System, Inc. v. *Democratic National Committee* (*"CBS* v. *DNC"*), 412 U.S. 94, 113-14 n.12 (1973).

Thereafter, while suggesting that Section 312(a)(7) might impose some additional obligations on broadcasters,[8] the Commission often reaffirmed the view that Section 312(a)(7) placed maximum discretion in the broadcaster to determine the public interest in the sale of time. For example, in *Anthony R. Martin-Trigona*,[9] the Commission's Broadcast Bureau held that a broadcaster's discretion "extends not only to the type and amount of time to be made available to candidates, but to the date on which its campaign coverage will commence."[10] And, in a 1978 policy statement, the Commission again emphasized the substantial latitude for broadcaster judgment under Section 312(a)(7).[11]

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[8] *See Licensee Responsibility Under Amendments to the Communications Act Made by Federal Election Campaign Act of 1971*, 47 F.C.C.2d 516 (1974).

[9] 66 F.C.C.2d 968 (Broadcast Bur. 1977), *on reconsideration*, 67 F.C.C.2d 743 (1978).

[10] 66 F.C.C.2d at 969; *see also* 67 F.C.C.2d at 746 n.4 (1978); *Summa Corp.*, 43 F.C.C.2d 602 (1973); *Hon. Pete Flaherty*, 48 F.C.C.2d 838 (1974).

[11] *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1089 (1978). In that opinion, the Commission did express the view that Section 312(a)(7) created "a different, additional obligation" for broadcasters. *Id.* at 1088. But it stated that: "We continue to believe that the best method for achieving a balance between the desires of candidates for air time and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable, good faith discretion of individual licensees." *Id.* at 1089.

Factual Background of This Case

On October 11, 1979, Gerald M. Rafshoon, President Carter's media adviser, asked CBS to offer the Carter/Mondale Presidential Committee, Inc. (the "Carter Committee") a thirty-minute paid program on the CBS Television Network between 8:00 p.m. and 10:30 p.m. EST during the period December 4 to 7, 1979. The program, which was to be run following President Carter's anticipated announcement of his candidacy for reelection on December 4, was described as "a documentary outlining the President's record and that of his administration." *See* App. A at 5a, n.4.

CBS responded to the request on October 17, 1979. *See* App. A at 6a-7a, n.5. CBS declined to offer at that time the half-hour requested by the Carter Committee, but did offer two five-minute periods, one in prime time and one in the daytime hours. Emphasizing the "large number of present and potential candidates for the Republican and Democratic presidential nominations," CBS noted that two Republican candidates had previously sought to purchase half-hour periods, and that CBS had declined to sell the time, although making the same offer of two five-minute periods it made to the Carter Committee. *Id.*[12]

Agency Proceedings

On October 29, 1979, the Carter Committee filed a complaint with the Commission alleging that CBS and the other two networks had violated Section 312(a)(7). In

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[12] The Committee made similar requests to the two other major commercial television networks, American Broadcasting Companies, Inc. and National Broadcasting Company, Inc. Each network declined to make a half hour available in early December, but did indicate that it would sell time later in the campaign; indeed, ABC indicated that it would be willing to sell one half-hour of time in the first week of January 1980. *See* Response of American Broadcasting Companies, Inc. at 6 (Nov. 5, 1979).

its response to the complaint, CBS contended that its position was reasonable. CBS stated that it had traditionally sold half-hour periods to presidential candidates during later campaign periods and that it intended to do so in the 1980 election. Response of CBS Inc. at 7 (Nov. 6, 1979). However, it stated that it was unwilling to sell half-hour periods at that early stage of the campaign. CBS pointed out that the campaigns for the presidential nominations consisted not of one national contest, but of a series of state delegate contests extending over a long period of time. *Id.* Noting that "rarely, if ever, has the CBS Television Network received so many requests to purchase program length time periods this far in advance of a presidential election," *id.* at 4, CBS emphasized the large number of actual and potential candidates for the Presidency [13] and the substantial disruption of regular programming that would occur if those candidates requested and were granted time. *Id.* at 8. In addition, CBS pointed out that its local affiliates would likely be confronted with numerous access requests from candidates for Congress and state and local offices, as well as from presidential candidates. *Id.* at 11.

By a vote of four to three, the Commission decided in favor of the Carter Committee on November 20, 1979, 74 F.C.C.2d 631, App. B, and reaffirmed that decision on petitions for reconsideration on November 28, 1979. 74 F.C.C.2d 657, App. C. In its decisions, the Commission

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[13] By early December 1979, President Carter, Senator Edward M. Kennedy and Governor Edmund G. Brown, Jr., had announced their candidacies for the Democratic presidential nomination. Among Republicans, Senators Howard Baker, Robert Dole, and Larry Pressler; Representatives Phillip Crane and John Anderson; and Ronald Reagan, John Connally, George Bush, Harold Stassen and Benjamin Fernandez had announced. *See* 74 F.C.C.2d at 645 n.20, App. B at 92a, n.20.

found that the language and legislative history of Section 312(a)(7) provided little direction. 74 F.C.C.2d at 637-38, App. B at 78a-80a. It concluded that Congress had delegated to it "broad responsibility to define and implement" Section 312(a)(7).[14] *Id.* at 638, App. B at 80a.

The Commission decided that the question of when the sale of time should begin was for the Commission, not the broadcaster, based on the Commission's "own independent evaluation of the status of the campaign." *Id.* at 665, App. C at 124a. In this case, the Commission found that the sale of time was appropriate because the presidential campaign was already "in full swing." *Id.* at 645, App. B at 92a.

Having determined that the networks could not refuse to sell time to presidential candidates on the ground that it was too early in the campaign, the Commission addressed the question of whether other considerations would make it reasonable for the networks to refuse the request for time. *See id.* at 665, App. C at 124a. The Commission stated that broadcasters must give special consideration to individual candidate "needs," *id.* at 642, App. B at 87a, and rejected the argument that broadcasters may properly adopt political sales policies designed to meet the needs of all candidates in an even-handed fashion. *Id.* at 668-69, App. C at 129a.[15] In-

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[14] The Commission also held that Section 312(a)(7) conferred on it jurisdiction to apply the "reasonable access" requirements of Section 312(a)(7) to unlicensed television networks, 74 F.C.C.2d at 638-40, App. B at 80a-84a, despite the fact that Section 312(a)(7) in terms refers only to the revocation of station licenses or construction permits.

[15] The Commission did suggest that broadcasters may consider the needs of all candidates in general, 74 F.C.C.2d at 668-69, App. C at 129a, but it did not explain how a broad-

stead, the Commission stated that it expected a broadcaster "to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking the airtime." *Id.* at 666, App. C at 128a. Judgments as to the amount of time a candidate needs "are best left to the discretion of the candidate and his media adviser." *Id.* at 667, App. C at 127a.[16]

While holding that broadcasters may find that "countervailing factors" outweigh stated candidate needs, the Commission sharply limited broadcaster judgment in

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caster can adopt policies aimed at even-handed treatment of all candidates and yet vary his responses to particular requests in order to satisfy individual candidate demands.

[16] While the Commission indicated that the licensee retains some discretion to judge the reasonableness of a candidate's assessment of his own needs "in the broad sense," 74 F.C.C.2d at 642, App. B at 88a, it may not "substitute its judgment regarding the candidate's needs." *Id.*, App. B at 87a-88a. In the same vein, the licensee is not expected to evaluate "the 'political' importance or urgency of individual candidate needs in terms of a particular candidate's situation in the campaign, *e.g.*, where he stands in the polls or how he has fared in specific primaries." *Id.* at 667, App. C at 127a. But the licensee must consider the candidate's allegations of need, such as the need to discuss "a complex set of issues important to the electorate which he believes cannot be accomplished through spot announcements or short program requests," *id.* at 668, App. C at 128a, and the need for a statement of the candidate's position and record that "could not be accomplished later." *Id.*, App. C at 129. The Commission rejected CBS' argument that, if the individual needs of the candidate are to be given predominant weight, then CBS should be able to take into account the President's unparalleled access to the media. *Id.* at 669-70, App. C at 130a-131a.

evaluating those factors.[17] Thus, for example, broadcasters are not permitted to take into account the likelihood of multiple future requests by similarly situated candidates unless the imminence of such requests can be shown to a near certainty.[18]

On the basis of this approach, the Commission held the position of all three networks to be unreasonable. The Commission found that CBS' offer to sell two five-minute periods "might be reasonable under some circumstances." *Id.* at 650, App. B at 100a. But since CBS' offer was the

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[17] Apart from the individual needs of the candidate, the the Commission held that a broadcaster may consider such factors as the likelihood of multiple candidate requests, *see* 74 F.C.C.2d at 647, App. B at 95a-96a; the potential disruption of regular programming, *see id.* at 648, App. B at 97a; and the amount of time previously afforded a particular candidate. *Id.* at 667, App. C at 126a-27a. CBS' initial letter to the Carter Committee emphasized the first two factors. *See* App. A at 6a-7a, n.5.

[18] The Commission required broadcasters to "attempt to appraise the likelihood" of multiple requests at each stage of the campaign. 74 F.C.C.2d at 667, App. C at 126a. It encouraged broadcasters to consult with all candidates in order to ascertain their plans and achieve a coordinated result. *Id.* It did not suggest that the candidates are required to disclose their plans or to make firm commitments.

Many requests from similarly situated candidates might have to be granted under Section 315(a) of the Act, 47 U.S.C. § 315(a), which requires that licensees that make available the use of their station to candidates for an office afford equal opportunities to all other candidates for that office. *See also* 47 C.F.R. § 73.1940(e) (1979) (providing seven days for candidate to request equal opportunities); *Kennedy for President Committee* v. *FCC* (*"Kennedy II"*), No. 80-1549, slip. op. at 8 (D.C. Cir. Aug. 6, 1980) ("Sections 312(a)(7) and 315(a) . . . work in tandem to govern access to broadcast media by candidates for public offices").

same as the one made in response to requests by two Republicans, the Commission inferred that a "blanket" policy had been set prior to consideration of the Carter Committee's request, demonstrating that CBS had failed to take account of President Carter's particular needs for a thirty-minute program. *Id.* at 649-50 & n.32, App. B at 99a-101a & n.32. The Commission also found the concerns raised by CBS as to multiple candidate demands and disruption of network and station programming to be too remote and speculative to justify a refusal to honor the Carter Committee's request. *Id.* at 647-50, App. B at 95a-101a.

Finally, the Commission declined to decide whether its construction of Section 312(a)(7) was constitutional, holding that this was a matter for the courts, rather than the Commission, to decide. *Id.* at 665, App. C at 123a.[19] One member of the Commission majority, however, did express his view that Section 312(a)(7) violated the First Amendment. *See id.* at 655, App. B, at 108a (statement of Commissioner Quello).

Commissioner Lee, in dissent, stated that the majority's standard meant "that the networks do not have any choice other than to give the requested time." *Id.* at 681, App. C at 150a. In a separate dissent, Commissioner Washburn agreed, noting that

> "the document adopted by the majority today goes far beyond the proper limits of Commission responsibility in political broadcasting matters. In detail . . . it substitutes the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto. Such government intrusion is unwarranted, is illegal

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[19] *See also Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1094 (1978).

and, I fear, will have far-reaching consequences that will come back to haunt the Commission and the public again and again." *Id.* at 682, App. C at 151a.

Decision Below

Since the Commission decision appeared to depart in several ways from the policies it had previously followed, and to limit substantially broadcaster judgment in the sale of political time, CBS and the other networks sought review in the court below.[20] The Commission's decision was affirmed by a panel of the court of appeals composed of Senior Circuit Judge Bazelon, Circuit Judge Tamm and Chief Judge Markey of the Court of Customs and Patent Appeals. In an opinion by Judge Bazelon, the court essentially adopted the approach of the Commission, concluding that Congress in enacting Section 312 (a) (7) intended to create "a new right of affirmative access for candidates to federal elective office." App. A at 14a. The court dismissed as "dictum" this Court's statement in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee ("CBS* v. *DNC")*, 412 U.S. 94, 113-14 n.12 (1973) that Section 312(a) (7) "essentially codified" prior Commission practice. App. A at 20a. The court decided that this Court's treatment of the question was "not controlling" because it was "cur-

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[20] Each network filed a petition for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

The court of appeals stayed the Commission's order on November 29, 1979. *See* App. A at 10a-11a. Following the seizure of American Embassy personnel in Iran, the Carter Committee decided not to continue to seek a 30-minute period in the December 4-7 period. Consistent with its earlier response, CBS offered, and the Committee purchased, a five-minute period on December 4. The Committee also obtained a 30-minute period from ABC in early January and declined a similar offer from NBC. *See id.* at 11a. For reasons cited below, *see* note 26 *infra*, all parties and the court agreed that the case is not moot.

sory" and had "strayed far from what was before the Court." *Id.* at 20a-21a.

The court agreed with the Commission that determination of when the sale of time should commence is not an "editorial decision" but rather "purely a legal judgment" for the Commission. *Id.* at 28a. The court found CBS to have acted unreasonably because, in making the Committee the same offer of two five-minute periods previously made to the two Republican candidates, it had adopted an "across-the-board" policy and had failed to "tailor [its] response to the *individual* candidate." *Id.* at 39a-40a (emphasis in original).

The court below rejected the networks' contention that Section 312(a)(7), as construed by the Commission, violated the First Amendment. Finding that "Section 312(a)(7) represents only a congressional re-allocation of the 'use' of portions of the airwaves from the licensee to the candidate," the court concluded that the "broadcaster's exercise of journalistic discretion—his right to speak and editorialize—is unimpaired." *Id.* at 47a.[21]

In a separate opinion, Judge Tamm expressed grave concern about the Commission's actions. In his view, the Commission had come "perilously close to falling into the chasm of impermissible government action" violative of the First Amendment. *Id.* at 68a.[22] He noted that, in

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[21] The court below also concluded that, despite the language of Section 312(a)(7), Congress intended that the section apply to television networks, and that, in any event, such authority was "reasonably ancillary" to its authority over individual stations. App. A at 48a-52a, *citing United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

[22] The majority below gave short shrift to these concerns, noting only, in a footnote, that it "welcomed the admonition regarding agency conduct" contained in Judge Tamm's opinion. App. A. at 47a, n.117.

contrast to the role of the Commission in application of the fairness doctrine, the more expansive role claimed by the Commission under Section 312(a)(7) involved a significant danger that a government agency would consciously or unconsciously favor particular speakers or ideas. *Id.* at 60a-67a. Judge Tamm joined the majority, however, because he construed the networks' policies as "flat bans" on the sale of the type of time that the Committee sought in early December. *Id.* at 68a.[23]

REASONS FOR GRANTING THE WRIT

As construed by the Commission and the court of appeals, Section 312(a)(7) of the Communications Act is the only statutory provision that grants to a specific class of individuals a right to command use of the broadcast media for the presentation of their views.[24] In reaching that construction of the statute and sustaining it against attack on First Amendment grounds, the court below has decided statutory and constitutional questions of profound importance to political candidates, broadcasters and the public at large. These questions warrant review by this Court.

The radically new right of access that the Commission and the court below have found in the statute will trans-

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[23] Petitions for rehearing and suggestions for rehearing *en banc* were denied. Circuit Judge MacKinnon would have granted rehearing *en banc*. Appendices D, E.

[24] The court of appeals characterized the right of access at issue as an "affirmative" right of access. App. A at 14a. Such rights are sharply different from "contingent" rights of access, such as the right of reply to personal attacks, 47 C.F.R. § 73.1920 (1979), and the equal opportunities rule, 47 U.S.C. § 315(a), that come into play only after a programming decision is made by the licensee. In this case granting mandatory access under Section 312(a)(7) carries with it further contingent access obligations under Section 315(a).

form the process by means of which station and network facilities are made available for political broadcasts. Until this case, that process had been governed essentially by the good faith, independent judgments of broadcast licensees, subject to the "equal opportunities" requirement of Section 315(a) and to overall review by the Commission under the Act's public interest standard. Under the decision below, the role of the broadcaster will be sharply constricted and the role of the Commission will be correspondingly enlarged.

Upon complaint by any dissatisfied federal candidate, the broadcaster will have the burden of persuading the Commission that the individual candidate's stated needs are outweighed by countervailing factors. The broadcaster will not be permitted to rely upon general policies designed to meet the needs of all candidates evenhandedly. Nor will he be permitted to project the possible demands of other candidates. In addition to impinging on traditional broadcaster responsibility in programming matters, the decisions below, by giving the candidate and the Commission the power to make programming judgments in particular cases based on individual candidate needs, disserve the public interest in balanced television programming by restricting the broadcaster's ability to exercise his editorial judgment.

Such a regulatory scheme thrusts the Commission into a "continuing, case-by-case determination of who should be heard and when," *CBS* v. *DNC*, *supra*, 412 U.S. at 127. The dangers of such a system of enforced access to the broadcast media are especially profound in the highly charged arena of political broadcasting, where government decisions as to time allocations are plainly susceptible to the appearance of partiality. Those dangers are gravely exacerbated by a system that would require the Commission repeatedly to assess the weight that should be given to the needs of individual candidates and the adequacy of broadcaster responses to those needs.

The practical impact of the decision below will be substantial. Networks have received numerous requests for time, not only long before the nominating conventions, but even well before the first primaries. Individual stations receive requests from presidential candidates for time during state primaries occurring within their service areas. Stations will also receive requests from candidates for the Senate and House of Representatives, who are also granted rights of access under Section 312 (a) (7).

The wide-ranging interpretations of the statute by the Commission and the court of appeals in this case will have a substantial impact on all future cases arising under Section 312(a) (7) and have already been relied on frequently by complainants, the Commission and the courts as defining the basic standards under the statute.[25] The impact of the decisions below is no less than if the Commission had established wide-ranging requirements after a rulemaking, since the Commission's pronouncements are designed to set standards for guidance in all future cases. It is to be anticipated that in the congressional elections of 1982 and the presidential elections of 1984 questions as to the scope of Section 312(a) (7) will again arise with substantial frequency. The

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[25] *E.g., Kennedy for President Comm.* v. *FCC ("Kennedy II")*, No. 80-1549 (D.C. Cir. Aug. 6, 1980) (reaffirming the decision in this case, but holding that Section 312(a) (7) does not require broadcaster to make available free time to a candidate when he offers to sell time); *Kennedy for President Comm.*, 46 Pike & Fisher Rad. Reg. 1539 (Broadcast Bur. 1980) (station offer to permit candidate to share half-hour with three other candidates does not constitute "reasonable access" in view of candidate's stated need for half-hour to present recorded speech); *see also Kennedy for President Comm.* v. *FCC* (*"Kennedy I"*), No. 80-1482, slip op. at 16-17 n.61 (D.C. Cir. Aug. 6, 1980).

present case provides a unique opportunity for this Court to consider these questions in advance of those elections, to render a definitive construction of the statute, and to resolve the constitutional issues.[26] *Cf. Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974).

I. THE COURT BELOW HAS DECIDED AN IMPORTANT STATUTORY QUESTION CONTRARY TO A DECISION OF THIS COURT

Central to this case is the holding of both the Commission and the court of appeals that in enacting Section 312(a)(7) Congress did not intend to codify the Commission's prior practice under the public interest standard, but rather to "enlarge" broadcaster duties, 74 F.C.C.2d at 644 n.17, App. B at 90a, n.17, and to create a new individual right for federal candidates. While the language of the statute[27] is somewhat uncertain, as the

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[26] All the parties agree that the controversy is not moot, and the court of appeals so held, App. A at 52a-54a, on the ground that the controversy is one capable of repetition, yet evading review. *Gannett Co.* v. *DePasquale*, 435 U.S. 368, 377-78 (1979); *see also Richmond Newspapers, Inc.* v. *Virginia*, 48 U.S.L.W. 5008, 5010 (July 2, 1980). The case is also not moot because the Commission's finding that the networks acted unreasonably might be urged as a basis for further Commission action in other regulatory proceedings, *see Ginsberg* v. *New York*, 390 U.S. 629, 633-35 n.2 (1968), and because the Commission has decided a number of broad policy questions that go beyond the factual setting of the case and that are of a kind that are routinely reviewed by courts. *E.g., Pacifica Foundation* v. *FCC*, 181 U.S. App. D.C. 132, 556 F.2d 9 (1977), *rev'd*, 438 U.S. 726 (1978).

[27] The language of the statute and its placement in Section 312 of the Act suggest that subsection (a)(7) merely authorizes a new remedy (license revocation) for "willful or repeated" violation of an obligation to federal candidates, the

Commission found, *id.* at 637, App. B at 78a, the Commission's (and the court's) view of the statute is inconsistent with fundamental premises of the Communications Act, contrary to the legislative history of Section 312(a)(7) and contrary to this Court's own past construction of the statute.

Section 312(a)(7) was enacted against a long tradition of not affording rights of access in the first instance.[28] This Court has often recognized that Congress in enacting the Communications Act decided that the public interest would best be vindicated by a system of public trusteeship, rather than by treating broadcast licensees as common carriers subject to an obligation to make time available to any individual wishing to transmit a message.[29] In *CBS* v. *DNC*, *supra*, this Court extensively canvassed the legislative history and concluded that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent

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content of which is described as the provision of "reasonable access." That the section speaks of providing access or time to "a candidate," rather than to "candidates," *see* App. A at 15a, is immaterial. The Commission had long entertained complaints by individual candidates concerning their treatment by broadcasters under the public interest standard. But it measured broadcaster response to such complaints by the adequacy of the broadcaster's overall efforts in providing access to all candidates in significant races. *See, e.g., WROX*, 40 F.C.C. 339 (1962); *Grover C. Doggette*, 40 F.C.C. 346 (1962).

[28] This is to be contrasted with so-called "contingent" rights of access, which come into effect only after an initial programming decision by the broadcaster. *See* note 24 *supra*.

[29] Congress expressly provided in Section 3(h) of the Act, 47 U.S.C. § 153(h), that a broadcaster "shall not . . . be deemed a common carrier." *See FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

with its public obligation." 412 U.S. at 110. In *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), this Court recently held that the Commission's proposed mandatory access rules for cable television exceeded the Commission's statutory authority. This Court confirmed "the policy of the Act to preserve editorial control of programming in the licensee." *Id.* at 705; *see id.* at 708. Congress should not lightly be deemed—in Section 312(a)(7)—to have intended an important modification of a well-established statutory plan, particularly where such a change would raise substantial constitutional questions. *See* pp. 23-25 *infra.*

In *CBS* v. *DNC*, this Court found that no such modification had been intended. There the issue was whether broadcasters were required to sell time to a major political party and others seeking to buy time in order to influence the electorate. This Court emphasized that, notwithstanding amendments to the Act (including Section 312(a)(7)), and frequent congressional consideration of "various proposals that would have vested private individuals with a right of access," no individual or group has been given "a right to command the use of broadcast facilities." 412 U.S. at 113-14. In support, this Court pointed to Section 312(a)(7) and expressly concluded that the section:

> "essentially codified the Commission's prior interpretation of Section 315(a) as requiring broadcasters to make time available to political candidates. *Farmers Union* v. *WDAY*, 360 U.S. 525, 534 (1959). *See* FCC Memorandum on Second Sentence of Section 315(a) in Political Broadcasters-Equal Time, Hearings Before Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., on H.J. Res. 247, pp. 84-90." 412 U.S. at 113-14 n.12.

The court of appeals' facile characterization of this Court's conclusion as "dictum," App. A at 20a, simply

cannot be reconciled with this Court's reliance on its interpretation of Section 312(a)(7) as support for one of its central conclusions in *CBS* v. *DNC*.[30]

The legislative history fully supports this Court's view of the meaning of Section 312(a)(7). The report of the Senate Commerce Committee stated expressly that the obligation imposed by Section 312(a)(7) was already "inherent in the requirement that licensees serve the needs and interests" of the community of license. S. REP. No. 96, 92d Cong., 1st Sess. 34 (1971). The report also noted that the FCC had recognized the obligation as part of a licensee's responsibility under the public interest standard,[31] and stressed that under the statute the Commission "should *continue to consider* the extent to which each licensee has satisfied his obligation." *Id.* at 28 (emphasis added). Contrary to the court of appeals'

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[30] The Commission similarly attempted to dismiss this Court's statement in *CBS* v. *DNC* on the ground that "the Court did not . . . have the benefit of an interpretation by the agency with the obligation of enforcing" the statute. 74 F.C.C.2d at 662, App. C at 119a. In fact, this Court did have before it a contemporaneous view of the statute by the Commission. In its brief in that case, the Commission referred to the same authorities relied on by this Court and stated that the public interest standard entailed an obligation to make time available to candidates on a "reasonable basis." It continued:

> "*Congress has now codified this duty* to the limited extent of permitting the Commission to revoke licenses 'for willful or repeated failure to allow reasonable access . . . .' *Except to the extent modified, Congress has adhered to the original policy adopted in 1927.*" Brief of FCC in *CBS* v. *DNC* at 42-43 n.37 (emphasis supplied).

[31] S. REP. No. 96, *supra*, at 34, *citing Programming Inquiry*, 44 F.C.C. 2303 (1960).

decision, nothing in the history of Section 312(a)(7) indicates a congressional purpose to provide "greater access" than was provided under this pre-existing Commission policy.[32]

Indeed, enlarging the broadcaster's obligation to make available time would have been contrary to the purposes of the Federal Election Campaign Act of 1971—to reduce the cost of political campaigns and to shorten them.[33] The Senate Committee expressed concern that "[i]f candidates were given complete discretion to spend on the use of this media your Committee was fearful that in the closing months of a campaign the airwaves might become inundated with political broadcasts to the exclusion of entertainment and other public interest programs." S. REP. No. 96, *supra*, at 30. Moreover, there is reason to believe that members of Congress felt that the exercise by broadcasters of their judgment in responding to requests from candidates to purchase time would substantially alleviate the danger of inundation.[34] The Commission's

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[32] The snippets of contemporaneous history cited by the Commission and the court of appeals, *see* App. A at 17a, 74 F.C.C.2d at 637, App. B at 78a, to show a congressional purpose to afford "greater access" to candidates, in fact referred to other enumerated provisions of the bill, such as a proposal to repeal the "equal opportunities" provision of Section 315(a). *See* S. REP. No. 96, *supra*, at 20; S. REP. No. 229, 92d Cong., 1st Sess. 56 (1971); 117 CONG. REC. 28,792 (1971) (statement of Sen. Pastore).

[33] S. REP. No. 96, *supra*, at 22-28 (1971); 117 CONG. REC. 28,813 (1971) (remarks of Sen. Prouty).

[34] S. REP. No. 229, 92d Cong., 1st Sess. 118 (1971) (Supplemental Views of Messrs. Prouty, Cooper, and Scott); *see Hearings on S. 382 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 92d Cong., 1st Sess. 54 (1971) (testimony of Richard Kleindienst).

decision here deprives broadcasters of the right to exercise their editorial responsibility in the interests of the viewing public, and has the effect of encouraging candidates to seek greater access to the media and to engage in an ever-escalating effort to present competing political broadcasts, thereby lengthening campaigns and making them even more costly. Preservation of wide latitude for network judgments during the period of the primary campaigns would appear to be particularly important in this context since it is extremely doubtful that Congress intended any obligation to be imposed on networks to sell time on a national basis during the period of these individual state primary contests.[35]

Moreover, the requirement of the decisions of the Commission and the court below that broadcasters judge each candidate's "needs" individually and tailor a response to those needs cannot be reconciled with the congressional policy in favor of even-handed treatment in political broadcasting matters. In Section 315(a) of the Act, 47 U.S.C. § 315(a), Congress required that any station that makes the use of its facilities available to a candidate for public office must provide "equal opportunities" to all other candidates for that office. There is no suggestion that Section 312(a)(7) was intended to depart from this approach of candidate equality.[36]

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[35] In a companion provision added by the Federal Election Campaign Act of 1971, Section 315(b), 47 U.S.C. § 315(b), Congress provided that broadcast stations must make available to political candidates time at their lowest unit rate during the 45 day period prior to a primary election. Congress surely did not intend that networks must make available their lowest unit rate prior to every primary, for that would have the effect of making the lowest unit rate provision applicable to the networks for the greater part of a year.

[36] The Commission conceded that sale of the requested half-hour to the Carter Committee would make it difficult to justify a refusal to sell comparable periods to candidates for

In addition to being contrary to the evident congressional purposes, the Commission's decision here is also contrary to prior Commission construction of the statute. Before this case, the Commission had, in keeping with the congressional purpose to preserve wide latitude for broadcaster judgment, defined the phrase "reasonable access" by analogy to broadcasters' obligations under the fairness doctrine.[37] The cornerstone of that doctrine, which imposes upon broadcasters the obligation to cover issues of public importance and to present contrasting views on those issues, is reliance on broadcasters' good faith decision as to how best to satisfy those obligations.[38]

Certiorari should be granted to resolve this important statutory question.

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the Republican presidential nomination. 74 F.C.C.2d at 647, App. B at 95a. It suggested, however, that a different result might obtain in the case of minor party candidates. *Id.* at 647 n.28, App. B at 95a, n.28. Yet to the extent the Commission suggests the "needs" of the individual candidate are of central importance, it can be argued that the needs of minor party candidates for public exposure are greater than those of Democratic and Republican candidates.

[37] *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 538 (1972).

[38] *CBS* v. *DNC*, 426 U.S. at 127; *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 705 n.14 (1979), *Fairness Report*, 48 F.C.C.2d 1, 8 (1974); *Fairness Primer*, 40 F.C.C. 598, 599 (1964); *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251 (1949). Whether or not Section 312(a)(7) codified prior practice, use of a reasonability standard necessarily invites reference to standards of broadcaster responsibility developed in the context of the Commission's fairness doctrine.

II. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION AS TO THE CONSTITUTIONALITY OF MANDATORY ACCESS THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

If petitioner's statutory arguments are rejected, this case requires the Court to consider, for the first time, the constitutionality of a congressionally-imposed requirement of mandatory access to the broadcast media.

In two important earlier cases, this Court, while resting its decision on statutory grounds and not reaching the constitutional questions, looked with disfavor on proposals for compulsory access. In *CBS* v. *DNC*, *supra*, the Court held that neither the Communications Act nor the First Amendment compelled broadcasters to provide access to individuals wishing to purchase time to express their views on public issues. In *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), the Court held that Commission regulations establishing access requirements for cable television systems exceeded the Commission's statutory authority, and made clear that similar access requirements in broadcasting would also violate the statute. *Id.* at 704-05. Noting that the lower Court in that case had found that the access regulations violated the First Amendment, the Court recognized that the question of the constitutionality of government-imposed access systems was a substantial one.[39] *Id.* at 709 n.19.

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[39] In *PruneYard Shopping Center* v. *Robins*, 100 S. Ct. 2035 (1980), this Court again made clear that rights of access to the journalistic media raise substantial questions, in holding that a state constitutional principle requiring access to a shopping center "obviously" did not involve an "intrusion into the function of editors." *Id.* at 2044, *quoting Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974).

Important constitutional principles of preservation of broadcaster judgment in editorial matters underlie this Court's view of the requirement of the Communications Act. These principles cannot simply be dismissed, as the court of appeals attempted to do, by characterizing Section 312(a)(7) as a "congressional reallocation of the 'use' of portions of airwaves from the licensee to the candidate." App. A at 47a. In *CBS* v. *DNC*, this Court rejected the view (advanced by the lower court in that case and adopted again by the court of appeals here) that a broadcaster's journalistic discretion is limited to the "right to speak and editoralize." App. A at 47a. Rather, the editorial function as described by this Court extends to determining "who should be heard and when." 412 U.S. at 127. Similarly, this Court rejected the notion that "every potential speaker is 'the best judge' of what the listening public ought to hear." It stressed that:

> "All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material." 412 U.S. at 124

Thus, this Court found that the Communications Act places primary reliance on broadcasters, not the Commission, to exercise editorial responsibility in the interests of the entire viewing public. *Id.* at 125.

This Court in *CBS* v. *DNC* also emphasized that "a right of access system would tend to draw [the Commission] into a continuing case-by-case determination of who should be heard and when." 412 U.S. at 127. The dangers of government intrusion inherent in any access system are exacerbated by the access scheme at issue in this case, under which candidates for federal office seek time and those candidates, particularly the President, are in a position to influence Commission appointments, Commission budgets, and ultimately, Com-

mission decision-making.[40] As Judge Tamm noted in his separate opinion, "there is some evidence that the Commission has, on occasion, been subjected to direct political pressure." App. A at 64a, n.16. This danger is further exacerbated by the emphasis on the subjective "needs" of the individual candidate who seeks access; as a result, "an agency of the federal government is authorized to decide, based in significant part on the candidate's 'individual needs,' whether and to what extent a given political candidate is entitled to be heard on the nation's airwaves." *Id.* at 63a. Thus, the political sensitivity of requests for access under Section 312(a)(7) raises "the serious danger of non-neutral government action favoring one speaker over another." *Id.* at 67a.

Certiorari is warranted to decide this important question of the constitutionality of mandatory access systems.

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[40] These dangers are highlighted by the Commission's approach to enforcing its decisions. On reconsideration, the Commission rejected the networks' petitions for a stay pending judicial review, directing the networks to inform it within twenty-four hours of "how they intend to meet their Section 312(a)(7) obligations," and warning of "specific measures . . . to remedy any continued failure to comply. 74 F.C.C.2d at 676-77, App. C at 142a. Moreover, the Commission suggested in the course of these proceedings that it might impose sanctions where the licensee initially rejects a request and fails to convince the Commission of the reasonableness of his position. *See* Respondents' Memorandum on Question of Mootness, at 3-4 (Dec. 19, 1979).

CONCLUSION

For the reasons stated above, certiorari should be granted to review the judgment of the court of appeals.

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